Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1025

In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS R. LARKINS AND HERBERT M. LARKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' property falls outside the definition of "wetlands" in 33 C.F.R. 328.3(b) because the wetlands vegetation found on that property would not have been there under "normal circumstances."

2. Whether petitioners were excused from obtaining a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, on the ground that their clearing and diking of a wetlands area fell within the exemption in Section 404(f) of the Act for normal farming activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B17) is reported at 852 F.2d 189. The opinion of the district court (Pet. App. A1-A27) is reported at 657 F. Supp. 76.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1988. A petition for rehearing was denied on September 19, 1988 (Pet. App. C1-C2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this action, the United States alleged that petitioners violated Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. 1311(a), by filling and diking wetlands without

first obtaining a permit from the Army Corps of Engineers pursuant to Section 404(a) of the CWA, 33 U.S.C. 1344(a). In 1976, petitioners acquired 550 acres of land in the flood plain of Obion Creek, a tributary of the Mississippi River in Kentucky. Pet. App. B3. They immediately began digging drainage ditches, cutting timber, blasting beaver dams, and filling low spots, and in 1980 they began constructing dikes and levees on the land. *Ibid.* In 1982, the Corps advised petitioners that an aerial inspection revealed that they had been discharging materials into approximately 110 acres of land that the Corps considered wetlands subject to the CWA. Petitioners nevertheless completed the levees, which collected much of the water that previously saturated the land (*id.* at B3-B4), and enabled petitioners to cultivate the formerly inundated lowlands (*id.* at A6-A7).

The United States brought this action in 1984, seeking an injunction against further modification of wetlands without a permit, restoration of the wetlands that had been destroyed, and a penalty of $40,000. Pet. App. B2. The principal disputed issue at trial was whether petitioners' property constituted "wetlands" as defined by 33 C.F.R. 328.3(b) (formerly 33 C.F.R. 323.2(c) (1986)), which are subject to the requirements of the CWA, or were instead outside the coverage of the CWA. Pet. App. A2 n.2, A3, A8, B8.[1] Petitioners also contended that, even

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[1] The pertinent regulation provides:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b). Any discharge of dredged or fill materials into covered wetlands is forbidden unless authorized by a permit issued by

if their property constituted wetlands otherwise subject to the CWA, the CWA's "farm exemption," 33 U.S.C. 1344(f), applied. Pet. App. A3, A22-A25, B8.

Because petitioners had refused to allow an on-site inspection before completing the dikes and levees, the government was obliged to rely primarily on aerial photographs and post-filling soil analyses done pursuant to court order. Pet. App. A9. Aerial photographs taken in 1964, 1972, 1979, 1980, and 1981 showed that much of the land in question was subject to inundation. *Id.* at B4, A7 n.6. Government experts trained in identifying vegetation from aerial photographs testified that the color, shade, tint, and texture of the vegetation shown on the photographs (its "signature") identified it as typical wetlands vegetation. Experts trained in soil analysis testified that soil samples taken from the 110 acres in question had developed under wetland conditions over a long period of time, and an official soil survey compiled by the U.S. Department of Agriculture confirmed that the soils in this area were "hydric" or wetland soil types. *Id.* at B6, A10-A12. On-site inspections of areas of undisturbed vegetation confirmed the prevalence of typical wetland species. *Id.* at B6-B7, A15-A16.

Petitioners' evidence consisted chiefly of the testimony of two local farmers who stated that flood waters on the property tended to drain away quickly. Those witnesses admitted, however, that the land in question tended to be covered by standing water before it was purchased by petitioners. Pet. App. B7-B8.

Following trial, the district court found that the 110 acres in dispute were wetlands subject to the CWA. Pet.

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the Corps pursuant to Section 404 of the CWA, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-124 (1985).

App. A20-A21. The court also concluded that petitioners' construction activities are not entitled to the exemption for normal farming activities found in 33 U.S.C. 1344(f). That provision exempts from the permit requirement the discharge of fill material associated with certain farming, silviculture, or ranching activities. The exemption does not apply, however, if the discharge is incidental to "any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject" and that activity impairs the circulation or reduces the reach of such waters. 33 U.S.C. 1344(f)(2). The court held that petitioners are not entitled to the exemption because they "constructed the dikes and levees for the purpose of bringing the wetlands adjacent Obion Creek under cultivation, a use to which the site was not previously subject," and thereby reduced the reach of navigable waters. Pet. App. A24.

Having held that the construction of the dikes and levees without a permit violated the CWA, the district court ordered petitioners to comply with the government's proposed restoration plan calling for removal of most of the levees. Pet. App. Aa1-Aa2. The court assessed a $40,000 fine, to be lifted if petitioners complete the restoration plan within six months. *Id.* at Aa2.

On appeal, petitioners argued that the district court had failed to examine the amount and frequency of the soil's saturation. The court of appeals, relying on this Court's opinion in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), held that the numerical frequency of inundation or saturation is irrelevant, so long as "the saturation is sufficient to and does support wetland vegegation." Pet. App. B9 (quoting *Riverside Bayview,* 474 U.S. at 130). After reviewing the evidence, the court of appeals concluded that the district court's "finding that the land was sufficiently saturated to and did support wetland

vegetation was not clearly erroneous." Pet. App. B10. The court of appeals also affirmed the ruling that the farming exemption does not apply to construction that converts an area of wetlands to nonwetlands suitable for row crop farming. *Id.* at B12. Judge Merritt concurred, stating that he did not view the court's opinion as reaching the question whether the Corps' jurisdiction under the CWA extends to wetlands adjacent to nonnavigable tributaries of navigable waterways. *Id.* at B13-B17.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners' principal attack on the decision of the court of appeals is that it allegedly eliminates from the Corps regulation defining wetlands the requirement that the water inundating or saturating the land support wetland vegetation "under normal circumstances." As this Court noted in *Riverside Bayview,* 474 U.S. at 130 n.7 (quoting 42 Fed. Reg. 37,128 (1977)), the "normal circumstances" requirement was intended in part "to exclude areas characterized by the 'abnormal presence of aquatic vegetation in a non-aquatic area,' " so that an area would not be classified as a wetland because of "the aberrational presence of such vegetation in dry, upland areas." Petitioners apparently contend that the aquatic vegetation found on their land is attributable to unspecified abnormal circumstances (see Pet. 14).

This case, however, presents no appropriate occasion for this Court to examine the meaning of the phrase "under normal circumstances." Petitioners did not rely in the court of appeals on the allegedly aberrational char-

acter of the vegetation found on their property. They relied instead on the argument that the government had failed to show the amount and frequency of the soil's saturation. Pet. App. B9. Petitioners may not raise in this Court an argument that they did not make below. See *Berkemer* v. *McCarty,* 468 U.S. 420, 443 (1984); *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970).

Furthermore, there is no evidence that the aquatic vegetation found on the property is abnormal or aberrational. Petitioners argue (Pet. 14) that such vegetation is abnormal unless there is "some evidence of regeneration" or that the vegetation is prevalent "for at least more than one season." But the vegetation at issue in this case was hardly short-lived. Aerial photographs made in 1980 showed a prevalence of wetland vegetation on the site, and an on-ground survey in 1984 confirmed that vegetation that had not been cleared by petitioners was of the same type. Pet. App. A14-A16. Many of the wetland species found were mature trees (*id.* at B5-B6), and the soil analyses showed that the area had been saturated for perhaps thousands of years (*id.* at B6).

Petitioners' argument that this Court's opinion in *Riverside Bayview* and the opinion below eliminate the "normal circumstances" requirement is clearly wrong. *Riverside Bayview* did not eliminate that requirement, but limited it to its intended function, *i.e.,* to distinguish wetlands from aberrational instances of wetlands vegetation in dry areas. 474 U.S. at 130 n.7. The courts below did not reach the "normal circumstances" issue because petitioners never claimed that the wetlands vegetation on their property was an aberration.[2]

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[2] The district court correctly noted (Pet. App. A13-A14) that "normal circumstances" on petitioners' property were ended by petitioners'

2. Petitioners' claims regarding the farming exemption also do not warrant review. Petitioners (Pet. 19) fault the district court for allegedly ignoring evidence that the area was used for cropland from 1977 to 1980, but they cite no evidence for their allegation that it was so used. Likewise, there is no support in the record for their allegation (Pet. 18) that "the site had continuosly [*sic*] been used for silviculture with crops interspersed in areas where trees had not been replanted." As the court of appeals noted (Pet. App. B11), "[t]here was no evidence that the land in question had been cultivated for farming." The record shows instead that, after purchasing the land in 1976, petitioners simply dug drainage ditches, cleared timber, filled gullies, and constructed dikes and levees, all in an effort to make this land suitable for cultivation of soybeans, which commenced sometime between 1981 and 1984. *Id.* at A5-A7 & n.7.

Even if there had been an ongoing farming or silvicultural operation, the farming exemption could not apply to the construction of dikes and levees, as the courts below pointed out (Pet. App. A24, B12). The statute does not exempt a discharge of fill that is designed to bring an area of wetlands into a new use and reduces the reach of wetlands. 33 U.S.C. 1344(f)(2). Hence, the court of appeals (Pet. App. B12) correctly refused to apply the exemption, since the district court found (*id.* at A24) that petitioners "constructed the dikes and levees for the purpose of bringing the wetlands adjacent Obion Creek under cultivation, a use to which the site was not previously subject," and thereby "reduced the reach of wetlands." [3]

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clearing and filling, but this has nothing to do with petitioners' present argument that the wetlands vegetation previously on the property was abnormal.

[3] Contrary to petitioners' suggestion (Pet. 17), it was not improper for the court of appeals to rely on the Corps' 1982 regulatory guidance

Contrary to petitioners' contention (Pet. 20), the decision below does not conflict with *United States* v. *Akers*, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986). The Ninth Circuit stated, in dictum, that a permit should not be required for an ongoing farming operation when the farmer simply switches from one wetland crop to another. 785 F.2d at 820. The court held, however, that the construction of a dike for the purpose of drying out a wetland area required a permit. *Ibid.* That is exactly what petitioners did in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1989

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regarding the scope of the farming exemption (47 Fed. Reg. 31,813 (1982) (codified at 33 C.F.R. 323.4(c))). The language of the statute clearly excludes from the normal farming exemption all activities that bring an area of wetlands into a new use and reduce the reach or alter the flow of wetlands. The 1982 Corps regulations, promulgated after petitioners had completed much of their construction, simply give examples of activities that fall outside the exemption, such as building dikes to convert a wetland from silvicultural to agricultural use. The statute itself gave adequate notice that building dikes in order to convert an area of wetlands to a new use would not be entitled to the exemption.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00067